SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 441

GENERAL TRADING COMPANY, A CORPORATION DOING BUSINESS AS MINNEAPOLIS IRON STORE, PETITIONER,

vs.

STATE TAX COMMISSION OF THE STATE OF IOWA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA

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—9349

[fol. 1] **IN THE SUPREME COURT OF IOWA**

No. —. At Law

STATE TAX COMMISSION OF THE STATE OF IOWA, Appellee,

vs.

GENERAL TRADING COMPANY, A CORPORATION, D/B/A MINNEAPOLIS IRON STORE, Appellant

APPEAL FROM POLK COUNTY DISTRICT COURT

HON. LOY LADD, JUDGE

Appellant's Abstract of Record—Filed February 8, 1943

[fol. 2] On May 21, 1942, plaintiff filed in the office of the Clerk of the District Court of Polk County, Iowa, the following verified

PETITION IN EQUITY

Comes now the plaintiff and for cause of action against the defendant states:

1. That the plaintiff is a branch of the government of the State of Iowa and is charged with the power and duty to collect the use tax due the State of Iowa under Chapter 329.4 of the 1939 Code of Iowa.

2. That the defendant General Trading Company is a corporation organized and existing under the laws of the State of Minnesota with its principal place of business in Saint Paul, Minnesota and said defendant is engaged in the sale of certain merchandise through its branch under the trade name of Minneapolis Iron Store located in Minneapolis, Minnesota.

3. That during the period from April 16, 1937 through September 30, 1941 the defendant sold merchandise to Iowa purchasers which merchandise was used and consumed by said purchasers in Iowa, and not purchased for resale or processing and the manner in which said sales of merchandise were made was as follows:

The defendant sent solicitors or sales representatives into the State of Iowa who made certain representations

concerning its merchandise and took orders from the Iowa purchasers subject to acceptance at defendant's place of business in Minnesota, and the property was subsequently delivered upon said orders in interstate commerce to the purchasers in Iowa.

4. Plaintiff states that by virtue of the manner in which [fol. 3] defendant sold its merchandise the defendant was, during the period heretofore set forth a "retailer maintaining a place of business within this State" within the definition in paragraph 6 of Section 6943.102 of the Use Tax Law of Iowa and as such, required to collect and pay to the State of Iowa the use tax in the amount of 2% of the purchase price of said merchandise so sold during said period, as provided in Section 6943.109 of the 1939 Code of Iowa.

5. Plaintiff states that defendant failed to file use tax returns for said period and failed to collect and pay to the State of Iowa the use tax due the State of Iowa for sales and deliveries of merchandise during said period under the provisions of Section 6943.113 of the 1939 Code of Iowa and thereafter on October 6, 1941 the plaintiff Commission, acting pursuant to the provisions of Section 6943.116 of the 1939 Code of Iowa, determined the amount due the State of Iowa for such sales and deliveries of merchandise during said period in the sum of $360.00 with penalty computed to October 6, 1941 in the sum of $102.96, or a total of $462.96 and there is attached hereto marked Exhibit 'A' and by reference made a part hereof a copy of said assessment. Notice of said assessment was given to the defendant by registered mail addressed to the defendant at its place of business in Minneapolis, Minnesota, a copy of which notice is attached hereto, marked Exhibit 'B' and by reference made a part hereof. The return receipt of the registered envelope containing the notice of assessment bears date October 7, 1941 and there is attached hereto marked Exhibit 'B-1' the return receipt of said registered envelope which is by reference made a part hereof.

6. Plaintiff states that no appeal was taken from said [fol. 4] determination of tax and the time for appeal has expired.

7. Plaintiff states that the tax obligation of the defendant is a debt owed by the defendant to the State of Iowa

and is in the sum of $360.00 with accrued penalty and interest.

Wherefore, plaintiff prays for judgment against the defendant in the sum of $360.00 for use tax due the plaintiff by the defendant together with all accrued penalty and interest as by law provided until date of payment.

EXHIBIT "A" TO PETITION

IOWA STATE TAX COMMISSION

Des Moines, Iowa

In the Matter of Tax Liability of MINNEAPOLIS IRON STORE, Minneapolis, Minnesota

Determination of Tax Due and Order to Assess

On this 6th day of October 1941, the matter of taxes due the State of Iowa, under Chapter 329.4, Code of Iowa, 1939, from the above named party, comes on for hearing and determination and the State Tax Commission finds as follows:

That the above party has, as of the 23rd day of May 1941, been duly notified to file Retailer's Use Tax Returns and remit tax due.

That said party has failed to file such Returns and remit tax due.

That after examining the records of the Division of Re-[fol. 5] tail Sales and Use Tax, and pursuant to the provisions of Section 6943.116, Code of Iowa, 1939, the Iowa State Tax Commission finds tax due from the above party in amount $360.00 and penalty in amount $102.96.

Wherefore It Is Ordered, that an assessment be, and hereby is made and issued against said party, in amount $360.00 tax and $102.96 penalty, and the said party be notified of this determination and assessment.

Iowa State Tax Commission signed—Fred W. Nelson Chairman.

Use Tax—(Form UT No. 522).

EXHIBIT "B" TO PETITION

Iowa State Tax Commission
Division of Retail Sales and Use Tax
Des Moines

Notice of Assessment

No. 4394

Dated October 6, 1941

00000 Minneapolis Iron Store, Minneapolis, Minnesota.

You are hereby notified of personal property use tax assessment as shown below:

Period	Unpaid Tax	Additional Tax	Penalty	Total
April 16, 1937 through Sept. 30, 1941	$360.00		$102.96	$462.96

Reason:

Because of your failure to file Retailer's Use Tax Re- [fol. 6] turns for the period beginning April 16, 1937 and ending Sept. 30, 1941, this assessment is made pursuant to Section 6943.116, Code of Iowa, 1939.

You are further notified that unless within thirty (30) days of service of this notice, you apply to the State Tax Commission for a hearing, the amount of tax written herein will become irrevocably fixed.

The amount of tax herein is based on information available to this Department. The amount of penalty written herein is computed by authority granted in Section 6943.118, Code of Iowa, 1939.

JJH:HB.

Penalty on tax accrues at the rate of 1% per month. Your remittance payable to the treasurer of the state of Iowa, should be mailed promptly to the Iowa State Tax Commission, Division of Retail Sales and Use Tax, Des Moines, Iowa.

Iowa State Tax Commission
Division of Retail Sales and Use Tax in order to insure proper credit, this notice must accompany your remittance.

EXHIBIT "B-1" TO PETITION.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

(Signed) Minneapolis Iron Store (Signature or name of addressee) Ethyl Fall (Signature of address'es Agent).

Date of Delivery 10-7-42.

Post Office Department.

[fol. 7] Return to State Tax Commission Des Moines, Iowa.

Registered Article 143224.

Filed Polk County, Iowa, May 21, 1942, 9:35 A. M. Fred Barkalow, Clerk District Court.

Thereafter, by agreement of the parties and on motion of plaintiff, an order was entered, transferring said cause to the law docket of said court, and docketing the cause as No. 48281-91 Law. Thereafter, and on the 11th day of December, 1942, defendant filed in said cause the following verified

ANSWER

Comes now General Trading Company, defendant above named, and for answer to the petition of the plaintiff, states:

Defendant denies each, all, and every of the allegations, matters, and things in said petition set forth except as hereinafter specifically admitted.

Defendant admits the facts alleged and contained in paragraphs numbered 1, 2, 5, and 6 of said petition. Defendant further admits that two per cent (2%) of the purchase price on merchandise sold, in the manner hereinafter described, by it to persons residing within the State of Iowa during a period from April 16, 1937, through September 30, 1941, amounted to Three Hundred Sixty Dollars ($360.00).

Defendant avers that it is a corporation duly organized and existing under the laws of the State of Minnesota with its principal place of business in St. Paul in that state; that [fol. 8] it has never qualified to do business in the State of Iowa as a foreign corporation or otherwise under Iowa statutes; that it has not, during the period aforesaid, either

directly or by any subsidiary maintained any office, distribution house, sales house, warehouse, or other place of business, or any agent located in Iowa, through which it has sold tangible personal property to persons in Iowa. Defendant alleges that from time to time during the period aforesaid, defendant sent from the State of Minnesota into the State of Iowa travelling salesmen, none of whom ever lived or had headquarters in the State of Iowa; that said travelling salesmen went into the State of Iowa and solicited orders for merchandise which were expressly subject to acceptance or rejection by defendant at its office in Minneapolis, Minnesota. Said travelling salesmen made no contracts in Iowa and were not authorized to bind the defendant in any manner; that in filling such orders as were accepted by the defendant at its office in Minneapolis, Minnesota, goods and merchandise were shipped from the place of business of the defendant in Minneapolis, Minnesota, by delivery to common carriers, either by truck or rail, or by delivery to the United States Postal Department for transportation to such purchasers in the State of Iowa; such purchasers paid all costs of such transportation by such common carriers or by parcel post.

Defendant further avers that the business which it carried on, as hereinbefore alleged, constituted merely a purely interstate business; that its right to engage in such business was not dependent upon any law of or privilege extended by the State of Iowa and was not subject to regulation by the State of Iowa; that the right to engage in such business is a right conferred upon defendant by virtue of the Con- [fol. 9] stitution and laws of the United States and by the laws of Minnesota; that as applied to the transactions of the defendant hereinbefore set forth, plaintiff and the State of Iowa were, and are, wholly without jurisdiction to make any assessment against or charge upon this defendant for the privilege of carrying on such interstate business, and that if Chapter 329.4, Iowa Code of 1939, commonly known as the Iowa Use Tax Act, be construed to give the plaintiff power to make an assessment against the defendant, the said Act is void for the reason that said law violates the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and further violates the provisions of Section 8, Article I, of the Constitution of the United States, which vests in the Congress of the United States exclusive power to regulate commerce

with foreign nations and among the several states; that if so construed, said statute would result in the taking of property of this defendant without due process of law, contrary to and in violation of the provisions of Section 9, Article I, of the Constitution of the State of Iowa.

Defendant further avers that as applied to this defendant, the provisions of Chapter 329.4 Iowa Code of 1939, which purports to render the tax required to be collected by any retailer a debt owned by the retailer to the State of Iowa, are void because if so construed, there would thereby be vested in the State of Iowa the power to create a personal liability as to persons and corporations who are not subject to the laws of the State of Iowa and not within the jurisdiction of said state; and, therefore, deprives defendant of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United [fol. 10] States, in violation of Section 8, Article I, of the Constitution of the United States, and in violation of Section 9, Article I, of the Constitution of the State of Iowa.

Defendant further avers that it is not subject to the Use Tax Law of the State of Iowa under the provisions of Chapter 329.4, Iowa Code of 1939, since it is not a retailer maintaining a place of business in this state, and that there is no authority granted by the statutes of Iowa to plaintiff to make any assessment of said use tax against this defendant or to require defendant to collect said use tax upon sales so made by defendant in the State of Minnesota, and that said assessment is, therefore, void under the terms of the Iowa law.

Defendant avers that the enforcement of the demand of plaintiff as set forth in its petition under the facts hereinbefore admitted and alleged would result in a regulation of the conduct of defendant's business without the boundaries of the State of Iowa, and would result in the taking of property of the defendant without due process of law, all contrary to and in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and, further, would result in the unlawful regulation of and imposition of a direct tax upon sales in interstate commerce, contrary to the provisions of Section 8 of Article I of the Constitution of the United States and would result in the taking of property of this defendant without due process of law, contrary to and in violation of the pro-

visions of Section 9, Article I, of the Constitution of the State of Iowa, and further, would result in the exercise of the sovereign power of the State of Iowa beyond the boundaries thereof, as defined in the Constitution of the State of Iowa, and particularly, in the Preamble thereof.

[fol. 11] Wherefore, having fully answered the petition of plaintiff, defendant prays that said petition be dismissed and that it have judgment against the plaintiff for its costs herein.

On the same date, plaintiff filed in the office of the Clerk of the aforesaid court the following

DEMURRER TO ANSWER

Comes now the plaintiff and demurs to the answer filed by the defendant, and as grounds therefor plaintiff states:

Par. 1. That the facts stated in defendant's answer do not constitute any defense to plaintiff's cause of action, and if true, do not entitle defendant to a dismissal of plaintiff's petition in that:

(a) The answer shows on its face that the defendant in the conduct of its sales in Iowa is a "retailer" and a "retailer maintaining a place of business in this State" within the provisions of Section 6943.102, paragraphs 5 and 6 of the 1939 Code of Iowa;

(b) The answer shows on its face that the defendant is liable to the State of Iowa for the use tax assessment set forth in plaintiff's petition in that it affirmatively appears from the face of the answer that the defendant, as a "retailer" and a "retailer maintaining a place of business in this State", made the sales to Iowa purchasers, which sales are the subject of the use tax assessment, and therefore, under the provisions of the Iowa Use Tax Law, defendant is liable to the State of Iowa for said use tax assessment.

[fol. 12] On December 11, 1942, the Demurrer to the Answer of defendant came on for hearing before the District Court of Polk County, Iowa, Hon. Loy Ladd, Judge, and was fully argued by counsel for both parties and taken under advisement by the Court, with ruling to be announced at a later date. On December 30, 1942, there was filed in the office of the Clerk the following

Memorandum Opinion on Demurrer to Defendant's Answer

The plaintiff's suit is for use tax in the sum of $360.00 under the provisions of Chapter 399.4 of the 1939 Code of Iowa.

This cause is pending on plaintiff's demurrer to the answer of the defendant.

The demurrer has been argued both orally and in writing.

The facts admitted by the demurrer are that the defendant is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota, and not authorized to do business in Iowa; it has salesmen in Iowa soliciting and obtaining orders from customers subject to approval and filling in Minneapolis, Minnesota, by the defendant; and when received and approved by the defendant, the merchandise is delivered by the defendant to common carriers or to the United States mail and sent direct to the purchaser,—the customer paying the transportation charges.

It is the contention of the plaintiff herein that under the facts pleaded, the defendant is a "retailer" and a "retailer maintaining a place of business in this state" within the provisions of Paragraph 5 and 6 of Section 6943.102 of the 1939 Code of Iowa, and as such has made sales to Iowa [fol. 13] purchasers, which sales are subject to Use Tax and therefore defendant is liable for such under the provisions of Chapter 329.4 of the 1939 Code of Iowa.

It is contended by defendant that the transactions carried on constituted solely interstate business; that it has a right to do so under the Constitution of Minnesota and the United States; that Iowa is wholly without jurisdiction to make any assessment or charge against the defendant for the privilege of carrying on interstate business and that if Chapter 329.4 of the 1939 Code of Iowa be construed to give plaintiff power to make an assessment against the defendant, the act is void because the law violates the due process clause of the Fourteenth Amendment and Section 8, Article I of the United States Constitution, and Section 9, Article I of the Constitution of Iowa.

In other words, the defendant pleads that the Iowa Use Tax does not include the defendant within its provisions and if it does the law is unconstitutional.

It has been conceded that the transactions involved herein are solely in interstate business.

The question as to whether the defendant comes within the definition of "a retailer maintaining a place of business in this state," as defined in the Use Tax Law is answered by paragraph 6, of Section 6943.102 of the 1939 Code of Iowa, and it is the opinion of this court that the defendant under the facts pleaded is "a retailer maintaining a place of business in this state."

If the defendant is "a retailer maintaining a place of business in this state," the next question is whether the Use Tax statute fixing liability on such retailer to collect the use tax and establishing personal liability therefor is unconstitutional as contended by the defendant.

[fol. 14] A discussion of this question by this court would very likely not add a thing to what has already been said on the constitutional questions raised.

The cases of *Felt & Tarrant v. Gallagher*, 306 U. S. 62; 83 Law Ed. 488; *Nelson v. Sears-Roebuck & Company*, 312 U. S. 359-372; 85 Law Ed. 888, and *Mono-motor Oil Company v. Johnson*, 292 U. S. 86; 78 L. Ed. 1141 seem to this court to control this case in its main aspects.

The *Felt & Tarrant* case *supra* can only be distinguished from the case at bar in that the Felt & Tarrant Company had some of its products stored in California and had general agents residing there with a part of their expenses paid and power to appoint sub-agents. In that case the court relied on three cases, to-wit: *Bowman v. Continental Oil Co.*, 256 U. S. 642. *Mono-motor Oil Company v. Johnson, supra* and *Hendifer v. Silas Mason Co.*, 300 U. S. 577; 81 Law Ed. 814. It was specifically held that the company not qualified to do business in California and taking orders through its agents in California, subject to approval by the company and when approved, shipping the goods direct to the purchasers or to agents to deliver to the customer, came within the provisions of the California Use Tax law and was not unconstitutional wherein it made the seller responsible to collect the use tax from the purchasers.

The *Sears Roebuck* case, *supra*, is only distinguishable in its facts from the case at bar in that the company had retail stores in Iowa and had qualified to transact business in Iowa. The company also transacted a mail order business through its catalogs direct between the customer and the company at its home office in Chicago, Illinois. As the [fol. 15] mail order business alone as transacted by the company in the *Nelson v. Sears-Roebuck* case, did not come

within the definition of "a retailer maintaining a place of business in this state," under paragraph 6 of Section 6943.102, the provisions of Chapter 329.4 did not apply. But it was held that the company could not separate its mail order business from its business transacted from its stores in Iowa, for the purpose of eliminating its mail order business from the operation of the use tax. Therefore, if all the business of the Sears-Roebuck Company in Iowa, both mail order and through its retail stores in Iowa is considered one business, the company came within the definition of a "retailer maintaining a place of business in this state."

In the case of *Mono-motor Oil Co. v. Johnson, supra,* the complainant there sought an injunction prohibiting tax officers from requiring the distributor of motor oil received from another state to pay the state treasurer, the tax levied upon the consumer wherein it was stated:

> "There is no substance in the claim that the statute imposes a burden upon interstate commerce * * * the statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement * * *. the statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa and the requirement that the appellant as a shipper into Iowa, shall, as agent of the state report and pay the tax on the gasoline thus coming into the [fol. 16] state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

After a full consideration of the arguments submitted both oral and in writing, it is the opinion of the court (1) that the defendant is "a retailer maintaining a place of business in the State of Iowa," as defined in Paragraph 6 of Section 6943.102 of the 1939 Code of Iowa, and, (2) that under the decisions in the three cases above cited, the exaction by the state from the defendant to collect and pay the use tax on merchandise sold in Iowa, is a constitutional exercise of the taxing power of the State of Iowa.

The court has entered upon the motion docket, the following ruling: "December 30, 1942. The demurrer of the plaintiff to the answer of the defendant is hereby sustained. The defendant is hereby granted ten days to plead over and upon its failure so to do, judgment will be entered by the court against the defendant in the sum of $360 and costs. To all of which the defendant excepts."

(S.) Loy Ladd, Judge.

Thereafter, and on the 6th day of January, 1943, defendant, by its counsel, in open court, refused to further plead and elected to stand upon its Answer, and the defendant having refused to plead further, the Court then proceeded to hear the testimony of the plaintiff, and at the conclusion of said hearing made and entered of record the following

[fol. 17] JUDGMENT ENTRY

Be it remembered that this cause came on to be heard in the above District Court on or about the 3d day of December, 1942 upon plaintiff's Demurrer to defendant's Answer, John M. Rankin, Attorney General of the State of Iowa, and John E. Mulroney, Assistant Attorney General for the Tax Commission, appearing as counsel for plaintiff, defendant being represented by Gamble, Read, Howland and Rosenfield of the Des Moines bar.

After listening to the oral arguments of respective counsel and upon consideration of written briefs thereafter filed, the above District Court, Honorable Loy Ladd, presiding, sustained plaintiff's Demurrer to said Answer and the following calendar entry was thereupon accordingly made:

> "December 30, 1942. The Demurrer of the plaintiff to the Answer of defendant is hereby sustained. The defendant is hereby granted ten days to plead over and upon its failure so to do, judgment will be entered by the court against the defendant in the sum of Three Hundred Sixty ($360.00) Dollars and costs. To all of which defendant excepts."

Defendant, through its attorneys, has advised the court that it elects to stand upon the court's ruling on said Demurrer and therefore declines to plead further, defendant

specifically waiving the time granted to it by the court in which to plead over.

Now Therefore, on this 6th day of January, 1943, it is hereby ordered and adjudged that plaintiff have and recover of defendant the sum of $360.00 and the costs of the [fol. 18] action, taxed by the Clerk, at $.... and judgment for said sum is hereby entered in favor of plaintiff and against the defendant.

To all of which defendant duly excepts.

NOTICE OF APPEAL

Thereafter, and on the 8th day of January, 1943, defendant duly appealed to the Supreme Court of Iowa from the judgment of the Court made and entered on January 6, 1943, from the ruling of the Court sustaining the Demurrer of plaintiff to defendant's Answer, made and entered on or about December 30, 1942, and from each and every other order, entry, and finding in said cause adverse to the defendant, to the Supreme Court of the State of Iowa. Said appeal was perfected by service of a notice of appeal in writing, specifying the rulings and orders of the Court appealed from, as hereinbefore set forth, and by serving said notice of appeal upon the attorneys for plaintiff and by filing same in the office of the Clerk of the District Court of Polk County, Iowa, in due time as required by statute.

CERTIFICATE

We do hereby certify that the foregoing Abstract of Record contains all of the pleadings filed by the parties, all orders and rulings of the Court made and entered in said cause, and that the same constitutes a full, true, and complete abstract of the record in said cause in the District Court of Polk County, Iowa.

O'Brien, Horn, Stringer & Seymour, Gamble, Read, Howland & Rosenfield, Attorneys for Appellant.

[fols. 19-20] COST CERTIFICATE

We do hereby certify that the actual cost of printing the foregoing Abstract of Record was the sum of $20.00.

Gamble, Read, Howland & Rosenfield, Attorneys for Appellant.

NOTICE OF ORAL ARGUMENT

To: Charles W. Barlow, Clerk of the Supreme Court of the State of Iowa, and to State Tax Commission of the State of Iowa, Appellee; or

To: John M. Rankin, Attorney General of the State of Iowa, and Jens Grothe, Assistant Attorney General of the State of Iowa, Attorneys for Appellee:

You and each of you are hereby notified that upon the submission of this cause in the Supreme Court of the State of Iowa, appellant will be heard in oral argument.

Gamble, Read, Howland & Rosenfield, Attorneys for Appellant.

[fol. 21] IN SUPREME COURT OF IOWA

POINTS RELIED UPON FOR REVERSAL

Included in the brief of General Trading Company were the following points, relied on for reversal:

"Division II

The trial court erred in sustaining the demurrer to appellant's answer on the ground that, as applied to appellant, the imposition of a personal liability for the collection and payment of the use tax did not deprive appellant of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States (Abs. pg. 13, lines 30-35, pgs. 14, 15, 16). Due exception was taken to the ruling of the court sustaining the demurrer (Abs. pg. 16, lines 15-22).

The imposition of personal liability for the collection and payment of taxes based upon transactions beyond the borders of the state constitutes a denial of due process and a deprivation of property, in violation of the Fourteenth Amendment to the Constitution of the United States.

Dewey v. Des Moines, 173 U. S. 193, 43 L. Ed. 665.
Rhode Island Hosp. Trust Co. v. Doughton, 270 U. S. 69, 70 L. Ed. 475.
State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. Ed. 179.

Louisville & Jefferson Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. Ed. 513.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, 50 L. Ed. 150.

A. The mere solicitation of orders within a particular state by a non-resident person or corporation, which orders are subject to acceptance or rejection outside the state, does not constitute doing business therein so as to make the non-resident amenable to the tax laws of such state.

Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333, 69 L. Ed. 634.

Bank of America v. Whitney Central Bank, 261 U. S. 171, 67 L. Ed. 594.

People's Tobacco Co. v. American Tobacco Co., 246 U. S. 83, 62 L. Ed. 587.

[fol. 22] *Green v. C. B. & Q. Ry. Co.*, 205 U. S. 530, 51 L. Ed. 916.

Davis v. Farmers Coop. Equity Co., 262 U. S. 312, 67 L. Ed. 996.

Burnham Mfg. Co. v. Queen Stove Works, 214 Iowa 112."

(Appellant's Brief and Argument, pages 10 and 11.)

"Division III

The trial court erred in sustaining the demurrer to appellant's answer on the ground that, as applied to appellant, the provisions of the Iowa Use Tax Law did not violate Section 8, Article I, of the Constitution of the United States (Abs. pg. 13, lines 30-35; pgs. 14, 15, 16). Due exception was taken to the ruling of the court sustaining the demurrer (Abs. pg. 16, lines 15-22).

As applied to appellant, the Iowa Use Tax Law constitutes an exaction for the privilege of engaging in interstate commerce within the state of Iowa. No state has power, under the Commerce Clause of the United States Constitution, to exact a tax as a condition to engaging in interstate business. The statute, in so far as it requires appellant to collect and remit the use tax, is void under Section 8, Article I, United States Constitution.

Baldwin v. G. A. F. Seelig, 294 U. S. 511, 79 L. Ed. 1032.

Best & Co. v. Maxwell, 311 U. S. 454, 85 L. Ed. 275.
Fargo v. Stevens, 121 U. S. 230, 30 L. Ed. 888.
Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. Ed. 295.
Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455.
Real Silk Hosiery Mills, Inc. v. City of Portland, 268 U. S. 325, 69 L. Ed. 982.
West v. Kansas Natural Gas Co., 221 U. S. 229, 55 L. Ed. 716."

(Appellant's Brief and Argument, pages 21 and 22.)

[fol. 23] Included in the Reply Brief of General Trading Company, Appellant, were the following points:

"II

The imposition of a personal liability for the collection and payment of use taxes, based upon transactions outside the state, is beyond the power of Iowa, and violates the Fourteenth Amendment to the Constitution of the United States." (Reply Brief of General Trading Company, page 9.)

"III

No state may impose, in any form, a tax upon the privilege of engaging in interstate commerce within the state. A license or privilege tax upon appellant's traveling salesmen would necessarily be a tax upon the privilege of soliciting interstate business, and, as such, violative of Section 8, Article I, United States Constitution.

Robbins v. Shelby County Taxing Dist., 120 U. S. 489, 30 L. Ed. 694.
International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. Ed. 678.
Crenshaw v. Ark., 227 U. S. 389, 57 L. Ed. 565.
Wagner v. Covington, 251 U. S. 95, 64 L. Ed. 157.
Best & Co. v. Maxwell, 311 U. S. 454, 85 L. Ed. 275.
Simpson v. Gundry, 297 Mich. 403, 298 N. W. 81, Certiorari denied, U. S. Supreme Court.
Brown v. Simpson, 314 U. S. 674, 86 L. Ed. 539.
J. B. Simpson v. O'Hara, 277 Mich. 55, 268 N. W. 809.

Montgomery Ward & Co. v. Fry, 277 Mich. 260, 269 N. W. 166."

(Reply Brief of General Trading Company, page 15.)

RECORD OF SUBMISSION

At Book 34, Page 319, in the office of the Clerk of the Supreme Court of Iowa there appears of record the following entry, pertaining to the cause of *State Tax Commission v. General Trading Company:*

"Argued and submitted June 16, 1943."

[fol. 24] IN SUPREME COURT OF IOWA

OPINION—Filed July 27, 1943

Appeal from Polk District Court. Loy Ladd, Judge

Action to recover use taxes. Defense was that, because of defendant's method of doing business, no tax is due and, if the letter of the statute imposes a tax, the statute is unconstitutional. The tax commission filed a demurrer to the answer; the demurrer was sustained; defendant stood on the ruling, suffered judgment to be entered thereon, and appeals.—Affirmed.

O'Brien, Horn, Stringer & Seymour, of St. Paul, Minnesota, and Gamble, Read, Howland & Rosenfield, of Des Moines, Iowa, for appellant.

John M. Rankin, Attorney General of the State of Iowa; and Jens Grothe, Assistant Attorney General of the State of Iowa, for appellee.

MILLER, J.:

Plaintiff's petition asserts that defendant is a Minnesota corporation, selling merchandise under the trade name of Minneapolis Iron Store at Minneapolis, Minn.; from April 16, 1937, through September 30, 1941, defendant sold merchandise to Iowa purchasers who used and consumed same; defendant sent solicitors into Iowa who took orders from Iowa purchasers, subject to acceptance at defendant's store in Minnesota; the property was subsequently delivered upon said orders in interstate commerce to the purchasers

in Iowa; defendant thereby became a "retailer maintaining a place of business in this state" as defined by the Iowa Use Tax Law (Chapter 329.4, Code, 1939,) and was required to collect and pay to the state a use tax of 2% on the merchan- [fol. 25] dise so sold; defendant failed to collect and pay such tax; plaintiff determined the tax to be $360.00 and made an assessment accordingly; defendant was notified of such assessment and took no appeal therefrom; time for appeal has expired. The prayer demanded judgment for the use tax of $360.00 with statutory penalty and interest.

Defendant voluntarily appeared and filed answer which admitted certain allegations and denied others. Defendant admitted its corporate capacity, its place of business, the assessment of the tax, the failure to appeal therefrom, and that 2% of the purchase price of merchandise sold by defendant to residents of Iowa from April 16, 1937, through September 30, 1941, amounted to $360.00. The answer further asserted that defendant has not maintained any office, distribution house, sales house, warehouse or other place of business, or any agent located in Iowa, through which it has sold tangible personal property to persons in Iowa; from time to time during the period aforesaid, defendant sent traveling salesmen from Minnesota into Iowa, none of whom lived in Iowa or had headquarters in Iowa; such traveling salesmen solicited orders for merchandise in Iowa, which orders were subject to acceptance or rejection at defendant's office in Minnesota; the salesmen were not authorized to make and did not make any contracts in Iowa; in filling such orders as were accepted at its office in Minnesota, merchandise was shipped from Minnesota to Iowa by delivery to common carriers, truck or rail, or by delivery to U. S. Postal Dept.; the purchasers paid all costs of transportation by carrier or parcel post.

Based on the statement of facts aforesaid, the answer asserted that defendant's business was purely interstate, not dependent on any law or privilege extended by the State of Iowa and not subject to regulation by the State of [fol. 26] Iowa; defendant's right to do business was granted by the Constitution of the United States and the laws of Minnesota; plaintiff and the State of Iowa have no jurisdiction to charge defendant for the privilege of carrying on its interstate business; if the Iowa Use Tax Act be construed to give plaintiff power to make the assessment herein, the act is void because it violates the due process

clause of the 14th Amendment to the U. S. Constitution, violates Section 8, Article I of said Constitution and violates Section 8, Article I, Constitution of Iowa; defendant is not a retailer maintaining a place of business in Iowa and there is no liability to plaintiff under the terms of the act; enforcement of the assessment made by plaintiff would result in regulation of defendant's business without the boundaries of Iowa, contrary to the due process clauses aforesaid, would result in regulation of and imposition of a direct tax upon sales in interstate commerce, and the exercise of sovereign power by the State of Iowa beyond its boundaries, all in violation of the aforesaid constitutional provisions. The prayer of the answer was that the action be dismissed at plaintiff's costs.

Simultaneously with the filing of the answer, the tax commission filed a demurrer thereto, which asserted that (1) the answer shows on its face that defendant is a "retailer" and a "retailer maintaining a place of business in this state" as defined by paragraphs 5 and 6, Section 6943.102, Code, 1939; (2) the answer shows on its face that defendant, as a "retailer" and a "retailer maintaining a place of business in this state" made sales to Iowa purchasers and is liable for said use tax assessment under the provisions of the Iowa Use Tax Law.

The demurrer was duly argued and submitted; the court ordered that it be sustained; defendant refused to plead [fol. 27] further, elected to stand on the ruling, and judgment was entered for the assessment of the use tax in the sum of $360.00 and costs. Defendant has appealed to this court.

In sustaining the demurrer, the court determined that, under the allegations of the answer, defendant is a "retailer maintaining a place of business in this state" within the meaning of the use tax law. The defendant challenges such finding on four grounds, which may be classified into two, (1) that the court was wrong in interpreting the act so that it applies to defendant and (2) making the act applicable to defendant renders it unconstitutional. We find no merit in either contention.

I. The statutory provisions, interpreted by the trial court, are paragraphs 5 and 6 of Section 6943.102, Code, 1939. We think that said paragraph 5 defines a "retailer" to include anyone engaged in the business of selling at retail

tangible personal property for use in Iowa. Defendant was selling tangible personal property for use in Iowa and the sales were retail sales. Defendant was a "retailer" within the meaning of the act and does not contend otherwise. The contention is that defendant is not a "retailer maintaining a place of business in this state", as defined by paragraph 6 of said Section 6943.102.[1] The answer asserts facts from which it appears that, if the phrase were to be given its ordinary meaning, defendant is not such a retailer. But we are dealing with a statutory definition. The tax commis- [fol. 28] sion points out that the statute provides that a "retailer maintaining a place of business in this state" shall include "any retailer having • • • within this state • • • any agent operating within this state under the authority of the retailer • • • irrespective of whether such • • • agent is located here permanently or temporarily, or whether such retailer • • • is admitted to do business within this state." The language is sufficient to include defendant within the terms of the statutory definition. We cannot shut our eyes to the words of the statute. The use of the words is the prerogative of the legislature. Our own function is to interpret the words which it has used. The trial court was right in holding that defendant's operations bring it within the letter and the language of the statute.

II. This brings us to the question whether the statute, as applied to defendant herein, violates the state or federal constitutions. The tax commission places great reliance upon the cases of *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. Ed. 888, 61 Sup. Ct. 586, and *Nelson v. Montgomery Ward & Co.*, 312 U. S. 373, 85 L. Ed. 897, 61 Sup. Ct.

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[1] Paragraph 6, Section 6943.102, Code 1939, provides: "'Retailer maintaining a place of business in this state' or any like term, shall mean and include any retailer having or maintaining within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this state under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state pursuant to chapter 386."

593, which cases reversed the decisions of this court in *Sears, Roebuck & Co. v. Roddewig*, 228 Iowa 1273, 292 N. W. 130, and *Montgomery Ward & Co. v. Roddewig*, 228 Iowa 1301, 292 N. W. 142. The writer of this opinion was the author of the majority opinions of this court in those cases. Were it not for the lessons learned in that experience, the arguments of counsel for defendant herein might be more persuasive and convincing.

In the *Sears, Roebuck* and *Montgomery Ward* cases, *supra*, the question was whether the use tax law applied to mail order sales of tangible personal property for use in Iowa when the sales were completed outside of Iowa. This court, dividing five to four, held that it did not. The U. S. Supreme Court, dividing five to two, held that it did. In [fol. 29] those cases, the retailers were doing business in Iowa. The tax commission threatened to cancel their licenses to do business here if the use taxes on such mail order business were not collected and paid. There was a means of enforcement available there that is not present here. On that feature of the case, the majority opinion in the *Sears, Roebuck* case states, at page 364 of 312 U. S., as follows:

"But respondent insists that * * * there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power'. *Wisconsin v. J. C. Penny Co.*, 311 U. S. 435, ante, 267, 61 S. Ct. 246, 130 A. L. R. 1229, supra. Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. *Wisconsin v. J. C. Penny Co., supra.* Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts."

Counsel for defendant urge that the reference to the "impotency of state power" means constitutional impotency and is, therefore, authority for a reversal herein. We cannot agree with such contention. Justice Douglas was re- [fol. 30] ferring to language of Justice Frankfurter in the *J. C. Penny Co.* case there cited. In that case, Justice Frankfurter states, at pages 444 and 445 of 311 U. S., as follows:

"Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on the otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impotence of state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has conditioned the demand of the exaction upon happenings outside its own borders. The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction."

We are unable to interpret the language of Justice Douglas and Justice Frankfurter, above quoted, as committing the U. S. Supreme Court to any principle which would sustain defendant's contentions herein. This language, [fol. 31] considered with the decisions of the court in the *Montgomery Ward* case, *supra*, the case of *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62, 83 L. Ed. 488, 59 Sup. Ct. 376, and the decisions on which that case relies, would seem to be decisive against defendant herein.

In the *Felt & Tarrant* case, the operations of the retailer were very similar to those of defendant herein, except that

the general agents, who solicited orders to be accepted or rejected outside of California, were residents of California, and had permanent offices there. The company sought to enjoin collection of the California use tax. The action was dismissed. On appeal the judgment was affirmed. The court, per Justice McReynolds, states, at page 66 of 306 U. S., as follows:

"The argument is this—

"The appellant, an Illinois corporation, carried on no intrastate operations in California and is not subject to its jurisdiction. Such business as it transacts in California is interstate in character. California, therefore, lacks the power to require it (1) to act as the state's collecting agent with respect to use tax which may become due from California storers, users or consumers, or (2) to insure payment of such tax if it fails to make collections from the tax debtors, or (3) otherwise to act as a 'retailer' as defined by the Act and the appellees. The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce prohibited by the Federal Constitution. Numerous provisions of the statute, if applied, would deprive appellant of its property without due process of law.

"The trial court thought that both contentions were foreclosed by what was said and ruled in *Bowman v. Continental Oil Co.*, 256 U. S. 642, 650, 65 L. Ed. 1139, 1145, [fol. 32] 41 S. Ct. 606; *Monamoter Oil Co. v. Johnson*, 292 U. S. 86, 93, 95, 78 L. Ed. 1141, 1147, 1148, 54 S. Ct. 575; and *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582, 583, 81 L. Ed. 814, 818, 819, 57 S. Ct. 524. And we agree with that conclusion."

The opinion then reviews the cases above cited and quotes from some of them. From the *Silas Mason Co.* case, the court quotes from 300 U. S. 582, 583, as follows:

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end. * * * A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

From the *Monamoter Oil Co.* case, the court quotes the interpretation of the Iowa statute here in question, (292 U. S. 95), as follows:

"The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

In the *Montgomery Ward* case, the *Felt & Tarrant* case is expressly followed, the court stating, at page 376, of 312 U. S., as follows:

"It was stipulated that 'advertisements have been caused to be printed by the retail stores of the petitioner (Montgomery Ward & Co.) in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog.' This stipulation clearly means that respondent has solicited mail order sales in [fol. 33] Iowa. The fact that that solicitation was done through local advertisements rather than directly by local agents as in *Felt & T. Mfg. Co. v. Gallagher*, 306 U. S. 62, 83 L. Ed. 488, 59 S. Ct. 376, is immaterial. Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state. For that method of delivery also obtained in case of some of the orders involved in *Felt & T. Mfg. Co. v. Gallagher, supra.*"

The trial court interpreted the foregoing pronouncements as conclusive against defendant's contentions. We agree with the trial court. These decisions are directly opposed to the contention that the imposition of personal liability for the collection of taxes upon transactions beyond the borders of the state violates the due process clause of the 14th Amendment to the U. S. Constitution and the contention based on the fact that the sales were made in interstate commerce. The tax is not on the transaction or sale but is on the use of the article after it is acquired for use in Iowa through a sale in interstate commerce. If the collection of such a tax may be required in the event of a mail order sale consummated outside of Iowa, as in the *Sears, Roebuck* case, there is no constitutional limitation on the

applicability of the tax where the order is solicited in Iowa but the sale is completed outside of Iowa. Such was the express holding in the *Montgomery Ward* and the *Felt & Tarrant* cases. Defendant contends that the tax is an exaction for the privilege of engaging in interstate business. Such is not the holding in the cases above quoted. The *Montgomery Ward* case, the *Sears, Roebuck* case, the *Felt & Tarrant* case and the *Monamotor Oil Co.* case all involved interstate commerce. In three of them, the Iowa statute now before us was involved. The statute was sustained in each instance.

[fol. 34] In several of the cases above quoted from, the Supreme Court of the United States emphasized that the use tax is complementary to the retail sales tax. Retailers selling tangible personal property for use in Iowa are liable for a sales tax of 2% of the purchase price if the sale takes place in Iowa. Division IV, Chapter 329.3, Code, 1939. If the retail sales tax is collected and paid, no use tax is due. Paragraph 1, Sec. 6943.104, Code, 1939. But if the sale is made under such circumstances that the retail sales tax is not due, then there is a price differential in the amount of the sales tax which the use tax seeks to offset. By compelling defendant to collect and pay the use tax, the tax commission seeks to compel defendant to operate on an equality with the retailers in Iowa who, as a part of their business operations, collect and pay the retail sales tax on all sales made by them. The justice of such equality undoubtedly accounts in large measure for the liberality of the court in undertaking to sustain use tax statutes. This liberality has necessitated considerable reorientation in this field of constitutional law. Much of the argument of counsel would be quite persuasive and convincing had the U. S. Supreme Court adopted the dissenting opinion in the *Sears, Roebuck* case, written by Justice Roberts, with whom Chief Justice Hughes concurred. But the court determined otherwise. A precedent has been established which we are bound to follow. The trial court was right in so doing. The judgment must be and it is—AFFIRMED.

Oliver, Hale, Garfield, Smith, Bliss, Wennerstrum, and Mantz, J. J., concur.

Mulroney, C. J., takes no part.

[fol. 35] IN SUPREME COURT OF IOWA

JUDGMENT ENTRY—July 27, 1943

46273

"STATE TAX COMMISSION OF THE STATE OF IOWA, Appellee,

v.

GENERAL TRADING COMPANY, a Corporation, d/b/a MINNEAPOLIS IRON STORE, Appellant.

Appeal from Polk County District Court

In this cause, the Court being fully advised in the premises, file their written opinion Affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is here Affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the Appellant pay the costs of this appeal, taxed at $51.75 and that execution issue therefor."

IN SUPREME COURT OF IOWA

CERTIFICATE OF CLERK

I, Charles W. Barlow, Clerk of the Supreme Court of the State of Iowa, do hereby certify that the within and foregoing constitutes a true and correct copy of the record in the case of *State Tax Commission of the State of Iowa, Appellee, v. General Trading Company, a Corporation, doing business as Minneapolis Iron Store, Appellant*, No. 46273; that the same contains the abstract of record, the specification of points relied upon for reversal, as set forth in the brief and argument of General Trading Company, together with the record of the submission, opinion, decision, and final judgment rendered by the Supreme Court of Iowa in said cause, and I do hereby certify that the within and [fols. 36-37] foregoing is a true and exact copy of the matters herein certified as the same remain of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of my office at Des Moines, Iowa, this 24th day of September, 1943.

Chas. W. Barlow, Clerk of the Supreme Court of the State of Iowa. (Seal.)

[fol. 38] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 22, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of Iowa is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 311, which is also placed on the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 47,934, Iowa Supreme Court, Term No. 441. General Trading Company, a Corporation doing business as Minneapolis Iron Store, Petitioner, vs. State Tax Commission of the State of Iowa. Petition for a writ of certiorari and exhibits thereto. Filed October 19, 1943. Term No. 441 O. T. 1943.